

January 22, 2019, Update to Frequently Asked Questions During a Lapse in Appropriations, attached to OMB Memorandum M-18-05 (available at <https://www.whitehouse.gov/wp-content/uploads/2017/11/m-18-05-Final.pdf>)

The following guidance replaces the answer to question C.9, and supersedes any previous OMB guidance issued on this question:

C. Making Payments to Contractors and Grantees during a Lapse in Appropriations

Q9: In the case of a contract or grant that has been previously awarded (and thus for which available funds were obligated), may Federal employees be excepted from furlough to make timely payments to the contractor or grantee in accordance with the contract or grant?

A9: Yes. Such payment activity is “necessarily implied,” either because the funds that were obligated are multi-year or no-year or (if such funds have lapsed) because of the continued availability of funding, as provided in 31 U.S.C. § 1553(a), for making disbursements on amounts previously obligated. That provision states, “[a]fter the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account.”

As discussed in the answer to question I.B., above, a necessary implication can arise when an agency needs to incur obligations, even though there has been a lapse in the appropriation against which those obligations would be charged, to implement a congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse (including funds already obligated from the current fiscal year), where the suspension of the related activity during the funding lapse would prevent or significantly damage the execution of the terms of the statutory authorization or appropriation. In this case, even if the funds are no longer available for new obligations, the previously obligated amounts remain legally available for liquidating valid obligations. Not performing unfunded activities that are necessary to expend presently available funds would effectively cut off funding streams that are themselves unaffected by the lapse in appropriations.

In this sense, excepting the personnel who are needed to disburse previously obligated amounts is akin to the well-established practice of excepting personnel who are needed to make benefits payments. The administrative activities (funded out of annual appropriations) that are necessary to disburse benefit payments under entitlement programs, such as social security benefits (funded out of an indefinite appropriation), are excepted activity. This is because the action of making the payment is necessarily implied by the continued availability of funding for the benefits payments themselves; and the statute directing that the payments be made would be significantly damaged were the payments not made. The same holds true for the disbursement of other valid obligations, including payments to contractors and grantees.